SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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[fols. a & 1] [Captions omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A LAW TERM

At Law

Number 77860

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes, Defendant

DECLARATION—Filed March 12, 1930

The plaintiff, Noah Best, to whom letters of administration have been issued by the Supreme Court of the District [fol. 2] of Columbia, holding a Probate Court, upon the estate of Albert Edward Best, deceased, Administration Number 39,247, sues the defendant, District of Columbia, a body corporate for municipal purposes, created and existing under the Laws of the United States, for that heretofore, to wit, on the 28th day of April, A. D. 1929, by an injury done and happened within the limits of the District of Columbia, the death of the said Albert Edward Best was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect and default was such as would, if the death of the said Albert Edward Best had not ensued entitled him to maintain an action against the defendant.

And that at the time of the happening of the said injury hereinafter more particularly set out the defendant had municipal control and jurisdiction over and was charged with the duty of maintaining in a reasonably safe condition a certain wharf located at the foot of Ninth Street, Southwest, in the City of Washington, District of Columbia and used by said defendant as a Sand Wharf; that the said wharf was adjacent to a public street frequented by many people and children.

That it then and there became and was the duty of the said defendant to properly guard the approaches

to the said wharf, to maintain safe, secure and satisfactory guard-, bars or barriers in order that the said wharf and its approaches might not be peculiarly alluring and attractive to young children of tender years; and to maintain and keep a safe and proper lookout so that children of tender years would not be allured or invited or enticed to come around, near and on to the said wharf and to play on or about the said wharf; and not to permit the said wharf to remain unprotected or unguarded and to keep and to have the said wharf in a reasonably safe and proper condition with due regard to the safety of plaintiff's intestate and not unnecessarily and unreasonably expose him to danger and to maintain and care for and preserve the said wharf so that the said wharf, the planks and boards thereon, would not be dangerous and unsafe and that a reasonably safe and proper condition might be maintained.

And the plaintiff avers that the defendant in violation of its duties in the premises and in disregard of the same negli-[fol. 3] gently and carelessly failed to properly guard the approaches to the said wharf in that there was no proper gate, barrier, bar, guard or fence; and carelessly and negligently failed to maintain safe, secure, and satisfactory gates, bars, barriers, guards or fences; and failed and neglected to maintain and to keep a safe and proper lookout for children of tender years playing in, on and about said wharf so as not to unreasonably and unnecessarily expose such children to danger; and negligently and carelessly suffered and permitted the said wharf, planks and boards thereof, to be and remain in a dangerous and unsafe condition leaving large holes in said wharf, planks and boards unguarded and unprotected; that said defendant had full knowledge that the said wharf was dangerous per se yet, notwithstanding, the defendant negligently and carelessly for a long period of time allowed and permitted said wharf, the planks and boards thereof, to remain in the condition aforesaid and made no effort to protect or guard children of tender years from the dangerous condition thereof.

And the plaintiff's intestate being an inhabitant of the City of Washington, District of Columbia, and living with his parents therein in the vicinity of said dangerous wharf and being a child of tender years, to wit, the age of five years, and incapable of exercising ordinary care and pru-

dence, and without discretion or judgment in matters relating to a dangerous wharf, was on, to wit, the 28th day of April A. D. 1929, in company with other young children attracted and allured to the said wharf and did on the said date with other young children visit said wharf and while plaintiff's intestate was playing at, about and on the said wharf, which said defendant had permitted to become and remain in such condition as aforesaid, without any negligence or want of due and proper care on the part of plaintiff's intestate on, to wit, the 28th day of April, A. D. 1929, fell through one of the holes in said wharf, so unprotected and unguarded and without warning, into the water beneath said wharf and was drowned.

And the plaintiff's intestate whose death was caused by drowning, left surviving him a father, mother and four brothers and by reason of the premises and the statute in [fol. 4] such case made and provided an action for damages has accrued to the plaintiff in the sum of Ten Thousand Dollars ($10,000).

Wherefore he claims damages in the sum of Ten Thousand Dollars ($10,000) besides costs.

James A. O'Shea, John H. Burnett, Alfred Goldstein, Attorneys for Plaintiff.

Ordered filed without prepayment of costs.

F. L. Siddons, Justice.

Mch. 12/30.

In Supreme Court of District of Columbia

Plea—Filed April 7, 1930

* * * * * * *

The defendant, the District of Columbia, for a plea to the declaration filed herein, admits that it is a municipal corporation; but denies that the death of Albert Edward Best was caused by its wrongful act, neglect or default.

Defendant admits that on the 28th day of April, 1929, it exercised control and jurisdiction over a certain wharf located at the foot of Ninth Street, S. W., in the District of Columbia, which was used as a sand wharf. It denies, however, that the same was used exclusively for municipal purposes but avers that it was used entirely for governmental purposes, to wit, for the storage of sand and gravel

used in the construction of sewers and school buildings and of walls, walks and playgrounds appurtenant to public schools. It admits said wharf was adjacent to a public thoroughfare but denies that it was frequented by many people and children.

The defendant denies that it was charged with the duty of guarding, maintaining, supervising and protecting said wharf or its approaches as alleged in the declaration.

Defendant denies any violation of its duties as alleged in the declaration and denies that in disregard of the same that it negligently and carelessly failed to properly guard the approaches to the said wharf or maintain the same with reference to the gate, barrier, bar or fence, and denies that it [fol. 5] failed and neglected to maintain and keep a safe and proper gate, barrier, bar, guard or fence to or around said wharf. Defendant denies that it permitted the said wharf, planks and boards thereof to be and remain in a dangerous and unsafe condition with regard to the purpose for which the said wharf was used and maintained, and defendant denies that it had any notice as alleged in the declaration of the alleged condition of the said wharf and denies that no effort was made to protect or guard children of tender years from the dangerous condition thereof. Defendant avers that the said wharf and the approaches thereto were located on private property and that a board fence was maintained around said wharf and enclosure with two openings in said fence to permit the ingress and egress to said wharf for vehicles and persons who were employed on and about the said wharf. There was maintained a bar or gate at said openings at times when trucks were not passing from the public street to said wharf. That the said wharf, its approaches and enclosure were private and that persons without authority coming within the enclosure or on the wharf proper did so without authority in law and were trespassers. Defendant further avers that children of tender years were advised they were not permitted to play on and about said wharf. Defendant denies that said wharf and its approaches were peculiarly alluring and attractive to children of tender years.

Defendant avers that if the said Albert Edward Best was playing on the said wharf as alleged in the declaration that he was a trespasser and was guilty of contributory negligence and that this defendant owed no duty under the circumstances to the said plaintiff.

And as to each and every other allegation of fact in the said declaration, defendant avers that it has no knowledge or information thereof sufficient to form a belief, wherefore it can neither admit nor deny the same but in so far as the same may be material calls for strict proof thereof.

William W. Bride, Corporation Counsel, D. C.; R. E. Lynch, Assistant Corporation Counsel, D. C., Attorneys for Defendant.

[fol. 6] MEMORANDA

April 9, 1930.—Notice of trial, Note of Issue filed. Calendared.

April 6, 1932.—Jury sworn and verdict for defendant.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

JUDGMENT—April 12, 1932

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of the plaintiffs its cost of defense to be taxed by the clerk and have execution thereof.

MEMORANDA

April 13, 1932.—Appeal noted. Cost Bond fixed at $100.00 or $50.00 cash in lieu thereof.

May 6, 1932.—Undertaking on appeal ($100) approved and filed.

Proposed Bill of Exceptions filed.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ASSIGNMENTS OF ERROR—Filed May 6, 1932

* * * * * * *

Now comes the plaintiff by his attorney, John H. Burnett, Esq., and assigns for review to the Court of Appeals of the District of Columbia, on appeal in the above entitled cause, the following errors committed by the trial court:

(1) In Granting the motion of the defendant for a directed verdict upon the opening statement of the counsel for the plaintiff.

(2) In entering judgment on the verdict as returned by the jury.

James A. O'Shea, J. H. Burnett, Alfred Goldstein,
Attorneys for Plaintiff.

[fol. 7] Service of copy acknowledged this 6 day of May, 1932.

R. E. Lynch, Attorney for Defendant.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER SETTLING BILL OF EXCEPTIONS—May 18, 1932

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record whereupon the bill of exceptions filed herein is duly submitted, signed and made of record nunc pro tunc the date of trial.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed May 6, 1932

* * * * * * *

The clerk of the court will include in the transcript of the record in the above entitled cause the following:

(1) Declaration.
(2) Defendant's Plea.
(3) Memo: Note of Issue and Order to Calendar.
(4) Verdict.
(5) Judgment and Exception Noted.
(6) Memo.: Appeal Noted and Bond Fixed.
(7) Memo.: Appeal Bond Filed and Approved.
(8) Memo.: Bill of Exceptions Submitted.
Memo.: Bill of Exceptions Settled and Signed.
(9) Bill of Exceptions.
(10) Assignments of Error.
(11) This Designation.

James A. O'Shea, J. H. Burnett, Alfred Goldstein,
Attorneys for Plaintiff.

Service of copy acknowledged this 6 day of May, 1932.

R. E. Lynch, Attorney for Defendant.

[fol. 8] Clerk's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law. No. 77860

NOAH BEST, Administrator of the Estate of Albert Edward Best, Plaintiff,

vs.

DISTRICT OF COLUMBIA, Defendant

Bill of Exceptions

Be it remembered that at the trial of this cause before Mr. Justice Jennings Bailey and a jury on April 6, 1932, John H. Burnett, Esquire, appearing for the plaintiff and Robert Lynch appearing for the defendant, the following proceedings were had:

That a jury was impaneled and sworn and thereupon an opening statement on behalf of the plaintiff was made as follows:

Mr. Burnett: "If the court please, and you ladies and gentlemen of the jury: as I indicated to you in identifying the [fol. 9] case, this is a case against the District of Columbia filed by Mr. Best as administrator for the estate of his son. The facts that we will show you, briefly, are these, that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there on this morning and while in there fell through one of the holes in this wharf:

"That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole. Of course the child died, having been drowned; and the damages that the plaintiff has suffered as representing the estate of the child will be determined by you in your verdict if you are convinced by a preponderance of the evidence that we have established our case.

"That this wharf is not part of the public highway but is on private property of the District of Columbia, and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District."

That thereafter counsel for the defendant moved the Court to direct a verdict for the defendant upon the opening statement as above set forth on the ground that no cause of action had been stated therein; that after argument thereupon said motion was granted and plaintiff excepted thereto; that thereupon the Court directed the jury to return a verdict for the defendant, which was accord-
[fol. 10] ingly done and plaintiff excepted thereto on the ground that a cause of action had been stated. Whereupon, the verdict for the defendant was entered and plaintiff excepted thereto on said ground stated.

Each and all of the exceptions stated in the foregoing bill of exceptions were duly noted by the court at the time the same were severally taken, and said exceptions are signed as the several exceptions taken at the trial of the above entitled cause this 18th day of May, 1932, nunc pro tunc.

Jennings Bailey, Justice.

Consented to.

John H. Burnett, Counsel for Plaintiff. R. E. Lynch, Counsel for Defendant.

[File endorsement omitted.]

Wednesday, May 3rd, A. D. 1933.

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

The argument in the above entitled cause was commenced by Mr. J. H. Burnett, attorney for the appellant.

Thursday, May 4th, A. D. 1933.

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

The argument in the above entitled cause was continued by Mr. J. H. Burnett, attorney for the appellant, and by Mr. R. E. Lynch, attorney for the appellee, and was concluded by Mr. J. H. Burnett, attorney for the appellant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

v.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

Appeal from the Supreme Court of the District of Columbia

Argued May 3, 1933. Decided June 30, 1933

James A. O'Shea, John H. Burnett, and Alfred Goldstein, all of Washington, D. C., for appellant.

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William W. Bride, corporation counsel, and Robert E. Lynch, assistant corporation counsel, both of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Van Orsdel, Hitz, and Groner, Associate Justices

MARTIN, Chief Justice:

An appeal from a directed verdict in an action for damages for negligence.

The plaintiff below, appellant here, is the administrator of Albert Edward Best, deceased, and as such administrator sued the District of Columbia for damages caused by the alleged neglect of the District in maintaining a certain wharf in a dangerous condition, thereby causing the death of plaintiff's decedent.

In the declaration the plaintiff alleged that the defendant maintained the wharf upon the river edge in the city of Washington, which was used by the District as a sand wharf; that the wharf was adjacent to a public street frequented by many people and children; that it was the duty of the defendant to properly guard the approaches to the wharf in order that it might not be peculiarly attractive to children of tender years; and to maintain and keep a proper lookout so that children of tender years would not be enticed to come onto the wharf and play on or about it; and maintain it in a reasonably safe condition with due regard to the safety of plaintiff's intestate, and not unnecessarily and unreasonably expose him to danger, and to maintain the wharf so that it would not be dangerous and unsafe. But plaintiff averred that the defendant in violation of its duties negligently failed to properly guard the approaches to the wharf in that there was no proper gate or guard upon it, and negligently failed to maintain a safe lookout for children of tender years playing in, on, and about said wharf, so as not to unreasonably and unnecessarily expose such children to danger, and negligently suffered it to remain in a dangerous condition, leaving large holes in the floor unguarded and unprotected; that defendant had full knowledge that the wharf was dangerous, but notwithstanding for a long period of time negligently allowed it to remain in the condition aforesaid, and made no effort to protect or guard children of tender

years from the dangerous condition thereof; that the plaintiff's intestate, a child five years old, lived with his parents in the vicinity of the wharf, and was incapable of exercising ordinary care and prudence in matters relating to a dangerous wharf, and on April 28, 1929, in company with other young children, was attracted to the wharf and while playing upon it, without any negligence on the part of plaintiff's intestate, fell through one of the holes in the wharf into the water beneath and was drowned.

The defendant by plea denied all charges of negligence on its part.

The case came on to be tried, and counsel for plaintiff made an opening statement to the court and jury in which he repeated in substance the allegations of the declaration, stating also that some of the boards of the wharf extended over the water and that there were from 10 to 13 holes of varying sizes in the boards; that one of the holes was approximately three feet in diameter; that the wharf had some sort of barrier close to the street; that there was a fence between it and the sidewalk but the side portion was down, and children went in and out at their pleasure; that plaintiff's decedent went upon the wharf on the morning in question and fell through one of the holes in the floor and was drowned; that there was no one there at the time to keep the children away, and that the watchman who was stationed there arrived some time after the occurrence; that the wharf is not a part of the public highway but is on private property of the District and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District.

At the cloes of this statement counsel for the defendant moved the court to direct a verdict for the defendant on the ground that no cause of action had been stated by plaintiff's counsel, the court sustained this motion and directed the jury to return a verdict for the defendant, which was done and judgment entered accordingly. This appeal was then taken.

We cannot commend the procedure adopted by counsel for the defendant in filing the motion for a directed verdict at the close of plaintiff's statement to the jury. The motion raises issues which could properly have been sub-

mitted by a motion to dismiss the petition for want of substance. Had such a motion been submitted in ordinary course, the trial justice would have been given time in which to consider it, and in case it was sustained the plaintiff might have desired and been given an opportunity to amend. The course pursued in this case resulted in the dismissal of the cause before any testimony was taken, and under circumstances equivalent to a surprise, such as made it difficult for the plaintiff to amend his pleading if such course seemed proper and desirable.

It is apparent, of course, that the plaintiff's cause of action herein is founded upon the "attractive nuisance" doctrine which has been the subject of much litigation and many discordant decisions.

In 20 Ruling Case Law, p. 79, it is said:

"But inasmuch as children are less able to foresee and appreciate danger than are persons of mature years and intelligence, it is generally recognized that they are entitled to a greater degree of care than adults; and this has been particularly emphasized in the class of cases dealing with injuries from what have been termed 'attractions to children' or 'attractive nuisances.' These decisions establish that while a proprietor may owe no duty to adults with respect to instrumentalities maintained by him, he may be liable for injuries to a child of tender years for injuries sustained from the same instrumentalities. The doctrine has been well stated in the following terms: 'One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom.'"

The decision of the Supreme Court of the Unifed States in Sioux City R. Co. v. Stout, 17 Wall. 657, is the pioneer authority in the establishment of the doctrine in this country. In that case a railroad company was held liable in an action by a child about six years old, who had injured his foot while playing with a turntable belonging to the company, notwithstanding the contention that he was a trespasser and that the company owed him no duty. It appeared that the turntable was located in an open space

on the private grounds of the company, about 30 rods from the company's depot, in a hamlet of from one hundred to one hundred and fifty persons. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis, and a servant of the company had previously seen boys playing there and had forbidden them to do so.

It is said that this decision and several others that quickly followed it have given rise to an extraordinary controversy as to the merits of the "doctrine" established thereby and its relation to general theories of law. Many courts have given it their sanction and approval, while others have disapproved it. It is asserted that modern tendencies are toward a restriction rather than an extension of the principal thereby established. 20 R. C. L. 81.

In the case of Union Pacific Railway Company v. McDonald, 152 U. S. 262, a railway company which operated a coal mine near one of its stations in Colorado was in the habit of depositing the slack on an open lot between the mine and the station in such quantities that the slack took fire and was in a permanent state of combusion. This fact had been well known for a long time to the employees and servants of the company, but no fence was erected about the open lot, and no efforts were made to warn people of the danger. A lad 12 years of age and his mother arrived by train at the station and descended there. Neither had any knowledge of the condition of the slack, which, on its surface, presented no sign of danger. Something having alarmed the boy, he ran toward the slack, fell on and into it, and was badly burned. Suit was brought to recover damages from the railway company for the injuries thus inflicted upon him and it was held that the company was guilty of negligence and that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence.

In United Zinc and Chemical Company v. Britt, 258 U. S. 268, it appears that the defendant owned a tract of land on the outskirts of a town, on which was an open and abandoned cellar wherein water had accumulated, clear in appearance but dangerously poisoned with chemicals resulting from manufacturing operations formerly conducted there by the defendant. A traveled way passed within 120 feet of the pool and paths crossed the tract. Children came

upon the land, entered the water, were poisoned and died. Defendant knew the condition of the water; but the pool, if visible to the children without trespassing, was not proven to have caused their entry, nor were children in the habit of going to it. It was held that no license or invitation could be implied and that the defendant was not liable.

In the opinion of the court, delivered by Mr. Justice Holmes, comment was made upon the fact that judgment had been entered for the child by the Circuit Court of Appeals, largely upon the authority of the McDonald and Stout cases, supra, 264 Fed. 785. The opinion then proceeds with the following exposition:

"Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, and kindred cases were relied upon as leading to the result, and perhaps there is language in that and in Railroad Co. v. Stout, 17 Wall. 657, that might seem to justify it; but the doctrine needs very careful statement not to make an unjust and impracticable requirement. If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it woud have been entitled to assume that they would obey the law and not trespass. The liability for spring guns and man-traps arises from the fact that the defendant has not rested on that assumption, but on the contrary has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it. Chenery v. Fitchburg R. R. Co., 160 Mass. 211, 213. Infants have no greater right to go upon other peoples' land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand, the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is cerain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied."

It is clear that the foregong decision serves sharply to define and limit the doctrine of "attractive nuisance" in the Federal courts. This statement is fully justified by the fact that three justices of the Supreme Court sitting in the case filed a dissenting opinion in which it is said that the decision overrules two decisions (obviously the Stout and McDonald cases, supra) which had been considered as leading authorities for half a century. In the present case therefore we accept the rule that a landowner owes no general duty to keep his land safe for children of tender years, or even free from hidden dangers, if he has not directly or by implication invited them there. New York, New Haven, and Hartford R. R. Co. v. Fruchter, 260 U. S. 141.

In relation to the "attractive nuisance" doctrine this court in Sullivan v. Huidekoper, 27 App. D. C. 154, held that there is no duty upon the part of a real-estate owner, upon whose land is an open and unfenced pond, to keep his land safe for a trespasser, even when such trespasser is a boy ten years old; the primary duty to guard and protect a child against patent and unconcealed dangers devolves upon the parent, and not upon the owner of land upon which the child is trespassing.

In Hageage v. District of Columbia, 42 App. D. C. 109, this court held that no inherent dangers within the doctrine of attractive nuisances, and no concealed dangers amounting to a nuisance, are involved in uneven, declivitous ground leading to the top of a high retaining wall, or in the fact that the wall is unguarded, so as to render the District of Columbia as owner of the ground liable where it has not designated the same as a public playground, for the death of a child caused by falling down the declivity and over the wall, while at play thereon in accordance with the custom of the children of the neighborhood.

In Branan v. Wimsatt, 54 App. D. C. 374, it was held that children who enter a lumber yard by implied permission stand in no better relation to the owner than that of mere licensees, to whom owner owed no duty other than that of not wilfully causing them harm, and of not exposing them to hidden perils which could not be avoided by exercising due care; and that the doctrine of "attractive nuisance" does not apply to children of such age as to know the risk they assume when they play in a lumber yard; that doctrine being inapplicable to property not per

se dangerous, or peculiarly alluring or attractive to children, and excluding minors who have reached the age of discretion, or who, knowing the hazard, assume the risk of doing that which will imperil their lives or limbs.

Upon a review of the foregoing decisions, particularly that in United Zinc Company v. Britt, we are convinced that the plaintiff in the present case has not shown a cause of action against the District of Columbia because of the death of plaintiff's decedent.

It appears from the declaration and the statement of counsel in opening the case that the wharf in question was not open to the public, nor a place where people would be likely to congregate; it was a workaday wharf where sand and gravel were unloaded and taken away for use in the District. The wharf was not frequented by people in general, and it contained nothing that was alluring or attractive to anybody, young or old, unless it can be said that every wharf, however barren, is per se alluring and attractive to children. The wharf was bordered on the land side by a public street and not by a sidewalk; there was a barrier between the street and the wharf, although it is said that part of this was down; there was a watchman in charge of the place, although at this particular time he was absent, arriving there some time after the occurrence. Children would themselves be a nuisance about such a place and would not consciously be tolerated there. If the doctrine of "attractive nuisance" be made to apply to such a situation, it is difficult to see how any owner could safely operate a wharf at any place along the water edge where children might mischievously or from curiosity or sport undertake to play near the water. It cannot be said that under these circumseances there was either directly or by implication a license or invitation extended to anybody, young or old, to go upon the wharf, except those persons having business there. This brings the present case within the doctrine of the Britt case and leads to the conclusion which we have reached that the doctrine of "attractive nuisance" does not apply.

The judgment of the lower court is therefore affirmed with costs.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

v.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes, Appellee

GRONER, J., dissenting:

I regret I am unable to agree with the conclusion reached by the court in this case.

That the "turntable doctrine", or the "attractive nuisance doctrine", has been materially restricted by recent State court decisions I fully agree, and likewise I agree that, so far as the Federal courts are concerned, the effect of the Zinc Co. case (cited in the opinion of the majority) is to greatly modify the Stout and McDonald cases (also cited in the majority opinion), but I do not think that, giving the Zinc Co. case its broadest interpretation, it will support the non-suiting of the plaintiff here, as was done in the court below.

To maintain a wharf along the side of a public street and allow the fence separating it from the street to fall down from disrepair, and then to load it with sand and leave it unwatched and unattended, is, I think, to expose a bait which children will follow "as mechanically as a fish." I think the action of the court below should be reversed.

Friday, June 30th, A. D. 1933.

No. 5768, April Term 1933

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel,

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

June 30, 1933.

Per Mr. Chief Justice Martin.

Mr. Justice Groner dissenting.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Number 5768

NOAH BEST, Administrator, etc., Appellant,

vs.

DISTRICT OF COLUMBIA, Appellee

ORDER FOR TRANSCRIPT OF RECORD

Now comes Noah Best, appellant, by his attorneys and requests the clerk to prepare a Transcript of Record on writ of certiorari to the Supreme Court of the United States in the above entitled cause and include therein the following:

1. The printed Record in the Court of Appeals.
2. Minute entries as to argument in the case.
3. The Opinion.
4. The judgment.
5. This designation.

James A. O'Shea, John H. Burnett, Alfred Goldstein, 402 6th Street N. W., Attorneys for Appellant.

Service of copy acknowledged this 17th day of July, 1933.

R. E. Lynch.

[Endorsed:] Number 5768. Noah Best, administrator, etc., appellant, vs. District of Columbia, appellee. Order for transcript of record. James A. O'Shea, John H. Burnett, Alfred Goldstein, 402 6th Street N. W., Attorneys for Appellant. Court of Appeals, District of Columbia. Filed Jul. 17, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 22, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Noah Best, Administrator of the Estate of Albert Edward Best, deceased, Appellant, vs. District of Columbia, a Body Corporate for Municipal Purposes, No. 5768, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of July, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

(3951)

[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed November 6, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,080. District of Columbia Court of Appeals. Term No. 477. Noah Best, administrator of the estate of Albert Edward Best, deceased, petitioner, vs. District of Columbia. Petition for a writ of certiorari and exhibit thereto. Filed September 23, 1933. No. 477, O. T., 1933.

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FILE COPY

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CHARLES [illegible] CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Petitioner,
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Noah Best, administrator of the estate of Albert Edward Best, deceased, prays that a writ of certiorari be issued to review the judgment entered June 30, 1933, in the Court of Appeals of the District of Columbia in the above entitled cause.

Judgment Below.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel,

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

Questions Presented.

1. Upon a given state of facts is a defendant liable for injuries to an infant of five years of age under the doctrine of attractive nuisance?

2. Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

Statement of the Case.

The petitioner, Noah Best, filed suit in the Supreme Court of the District of Columbia for the wrongful death of his minor son. The declaration, among other things, alleged that the respondent, District of Columbia, maintained a wharf which was adjacent to a public street, frequented by many people and children; that it was the duty of the municipality (1) to maintain the wharf and its approaches in a manner that might not be peculiarly attractive to children, (2) to maintain barriers to keep out children of tender years, (3) to keep a safe and proper lookout so that children of tender years would not be allured, invited or enticed to come upon the wharf, (4) to keep the wharf in a safe condition. The declaration then alleges a breach of such duties, causing the death of petitioner's intestate, a child of five years, by drowning. (R. 1-4)

The plea of respondent neither denied that the intestate was playing on the wharf, nor that the age of petitioner's intestate was five years, and was incapable of exercising ordinary care and caution. Under the rules of pleading in the District of Columbia courts, these allegations were

deemed admitted. The plea expressly admitted that the wharf was controlled by the municipality and that it was used for the purpose of storing sand and gravel; it was admitted that the wharf was adjacent to the street. Denial of the other allegations followed, as well as allegations constituting affirmative defenses. (R. 4-5)

Counsel for petitioner made an opening statement and, upon motion by counsel for respondent, the trial court directed a verdict for respondent. (R. 9-10) The Court of Appeals affirmed this action.

The opening statement of counsel is an exact transcription of the stenographer's notes, together with such stenographer's punctuation.

By the opening statement it appears that the deceased and other children were playing on the wharf which extended over the water; the wharf had ten to thirteen holes in it, one of them three feet in diameter; the wharf was adjacent to the street, there being no sidewalk on the street; such wharf was not fenced off, but had some sort of a barrier close to the street, the side portion of which was down and through which the children went in and out at their pleasure, being attracted to the dangerous place maintained by the respondent. (R. 9)

Petitioner complains because the trial court directed a verdict for respondent upon this state of the case.

Rulings of the Courts Below.

The Supreme Court of the District of Columbia directed the jury to return a verdict for respondent, upon the opening statement of counsel for the petitioner, upon the ground that no cause of action had been stated. (R. 9)

The Court of Appeals of the District of Columbia affirmed the action of the trial court. (R. 19-20)

Reasons for Granting the Petition.

By its opinion in this case, the Court of Appeals of the District of Columbia has done away with the common law act based upon the doctrine of attractive nuisance.

The judgment of the Court of Appeals is, therefore, a legislative act rather than a judicial one.

The opinion of the Court of Appeals is in conflict with the following cases:

Cole v. *Penn. R. Co.* (C. C. A. 2), 43 F. (2) 953, 955;

Consol. L. & Z. Co. v. *Corcoran* (C. C. A. 10), 37 F. 296, 297, 298;

So. Pac. Co. v. *Marquez* (C. C. A. 9), 44 F. (2) 286, 287.

The opinions of the various circuit courts of appeal, in the last cited group of cases, and the opinion of the Court of Appeals of the District of Columbia, are in sharp conflict upon this question—Did the Supreme Court of the United States by its opinions in the cases of *United Zinc Co.* v. *Britt,* 258 U. S. 268, and *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, reverse the cases of *Railroad Co.* v. *Stout,* 17 Wall. 657, and *Union Pac. Ry.* v. *McDonald,* 152 U. S. 262, or did the Supreme Court, by such latter decisions, only narrow and restrict the limits of the attractive nuisance doctrine as stated in the earlier cases?

Question 1.

The facts, as admitted in the pleading and as set forth in the opening statement, make out a case to be submitted to a jury under the opinions of the Supreme Court in the Stout and McDonald cases, *supra,* and under the opinion of the Circuit Court of Appeals for the 6th Circuit in the case of *American Ry. Exp. Co.* v. *Crabtree,* 271 F. 287, 288.

Question 2.

If the opinions of the Supreme Court in the Britt and Fruchter cases, *supra,* are held to be a modification or limitation of, and not a reversal of, the theory of the doctrine of attractive nuisance as announced by the Supreme Court in the Stout and McDonald cases, the trial court should have submitted the case to the jury.

The Court of Appeals of the District of Columbia, in this case, held that the Supreme Court, in the Britt and Fruchter cases, overruled the doctrine of attractive nuisance as announced in the Stout and McDonald cases.

The Circuit Courts of Appeal for the 2d, 9th and 10th Circuits have held that the Supreme Court did not overrule such doctrine, but modified and limited it.

Cole v. *Penn. R. Co.* (C. C. A. 2), 43 F. (2) 953, 955;
Consol. L. & Z. Co. v. *Corcoran* (C. C. A. 10), 37 F. (2) 296, 297, 298;
So. Pac. Co. v. *Marquez* (C. C. A. 9), 44 F. (2) 286, 287.

In the above opinions of the Circuit Courts of Appeal, the opinion of the Supreme Court in the Britt and Fruchter cases was distinguished from the opinions in the Stout and McDonald cases. In those circuits the doctrine of attractive nuisance is still applicable when cautiously applied. The Court of Appeals of the District of Columbia held that the doctrine was inapplicable in any case.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this Court for its review and de-

termination on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in case numbered 5768, and entitled on its docket "*Noah Best, Administrator of the estate of Albert Edward Best, deceased,* v. *District of Columbia,*" and that the said judgment of the Court of Appeals of the District of Columbia may be reversed and for such other and further relief as to the Court may seem meet and proper.

NOAH BEST,
Administrator of the Estate of
Albert Edward Best, Deceased,
By JAMES A. O'SHEA,
JOHN H. BURNETT,
ALBERT GOLDSTEIN,
Washington, D. C.,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

Opinion.

The majority opinion and the dissenting opinion (Groner, J.) of the Court of Appeals of the District of Columbia (Chief Justice Martin, Associate Justices Robb, Van Orsdel, Hitz and Groner) were filed June 30, 1933, and appear at pages 11 to 18 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C., Sec. 347). The judgment of the Court of Appeals of the District of Columbia was entered June 30, 1933. This petition was filed September 23, 1933.

Noah Best, as administrator of the estate of his deceased son, Albert Edward Best, filed suit in the Supreme Court

of the District of Columbia as provided in the Code of said District (Tit. 21, Secs. 1-3) for the wrongful death of said son. Noah Best is the petitioner herein, and the defendant in the trial court, the District of Columbia, is respondent.

The action in the lower court was based upon the doctrine of attractive nuisance. By the admissions in the pleadings and the opening statement of counsel for the petitioner, it appears that the respondent operated and controlled a sand wharf in the District of Columbia. Children were accustomed to going into this place where sand and gravel were stored. The wharf was immediately next to the street and the children were in the habit of going to and from the wharf at places where there was no barrier or fence. The child who was drowned was five years of age, and was playing on the sand wharf with other children just before he fell through the wharf. The trial court, after counsel for petitioner had made his opening statement, refused to submit the case to the jury and directed said jury to return a verdict for the respondent on the ground that no cause of action against respondent had been stated.

The Court of Appeals of the District of Columbia affirmed the action of the trial court.

The law upon the record in this case, as stated by the Court of Appeals of the District of Columbia, is not in harmony with the law as stated by the Supreme Court of the United States and the Circuit Courts of Appeal for the 2d, 6th, 9th and 10th Circuits.

The Facts.

The facts are stated in the petition, pages 2 and 3.

ARGUMENT.

The argument will follow the order of the title "Questions Presented."

(1)

Upon a given state of facts is a defendant liable for injuries to an infant under the doctrine of attractive nuisance?

The doctrine of attractive nuisance was clearly stated in *Union Pac. Ry. Co.* v. *McDonald,* 152 U. S. 262; the court said, p. 279:

> "We adhere to the principles announced in *Railroad Co.* v. *Stout, supra.* Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pit, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision * * *."

(p. 280):

> "Referring to the case of *Townsend* v. *Wathen*, Judge Thompson in his work on the Law of Negligence, Vol. 1, p. 305 n., well says: 'It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.' Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine."

In *United Zinc Co.* v. *Britt*, 258 U. S. 268, the court stated that the reason for the rule there laid down was because there was no evidence (1) that the children could see the attractive nuisance from where they lawfully were; (2) that such sight attracted them to the nuisance. The court said, p. 275:

> "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty."

At page 276 of the opinion, the court pointed out that the facts failed to show that it was the habit of the children to go to the place of the nuisance. The court said:

> "* * * It does not appear that the children were in the habit of going to the place; so that foundation also fails."

In the opening statement in the case at bar, counsel said that the place of the nuisance was right off of the street,

on which there was no sidewalk, and the same was maintained by the District as an attractive nuisance; that the side portion of the barrier at the street was down, and that the children used the place to play on and went in and out at their pleasure. (R. 9)

All three of the exceptions to the rule laid down in the Britt case were met. That case does not govern the case at bar, because the facts were different from the case at bar.

The present action was based upon two sets of facts (1) showing that the children lawfully in the street could see the attractive nuisance because the barrier thereto was down and the same was maintained by defendant and attracted the children there; and (2) the children were in the habit of playing at that place. (R. 9)

The case of *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, the child was injured by an unguarded electric wire after climbing a pole 29 feet in height in order to reach a pigeon's nest. That case is not in point. The Circuit Court of Appeals for the 2d Circuit so states.

In *Cole* v. *Penn. R. Co.* (C. C. A. 2) 43 F. (2) 953, 955, the court stated that the reason for the doctrine announced in the Fruchter case was:

> "* * * on the ground * * * that the doctrine laid down in the *Railroad Co.* v. *Stout,* 17 Wall. 657, and *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S. 262, did not cover the facts presented."

In the case of *Am. Ry. Exp. Co.* v. *Crabtree* (C. C. A. 6) 271 F. 287, 288, the court held that the question of negligence in an action by an administrator for the death of an infant, which action is based upon the doctrine of attractive nuisance, was a question of negligence which must be submitted to a jury.

QUESTION 2.

Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

In the Britt case, the children were 8 and 11 years old, the nuisance was 100 to 120 feet from where the children were. The children in that case and in the Fruchter case had to seek out the nuisance. The case at bar does not come within those facts.

The majority opinion in the Britt case does not expressly reverse the turntable doctrine. To the contrary the court said, p. 275:

> "* * * But the (turntable) principle if accepted must be cautiously applied."

We must determine whether the Britt and Fruchter cases reverse the Stout case, by implication. Various courts have held that they do not.

In *Consolidated Lead & Zinc Co.* v. *Corcoran* (C. C. A. 10) 37 F. (2) 296, an attractive nuisance case, the court reversed the case because of the instructions to the jury, but announced the law of the case to govern the second trial. The nuisance was "near and in plain view of the road" (p. 296), "the children were in the habit of playing about the nuisance" (p. 296). In speaking of the effect of the opinion in the Britt case, the court said, p. 297:

> "* * * That case distinguished *Railroad Co.* v. *Stout*, 17 Wall. 657 * * * and *Union Pacific Railway* v. *McDonald*, 152 U. S. 262 * * *. Both of those cases are more nearly applicable here. The Britt case was essentially different in the facts, which were held not to impose the duty of care. The court said: 'There can be no general duty on the part of the

landowner to keep his land safe for children, or even free from hidden dangers,' but was careful to add, 'if he had not directly or by implication invited or licensed them to come there.' The case (*Zinco Co.* v. *Britt*) is obviously not in point."

The court then held that the facts alleged in the declaration were proved and that the motion to direct a verdict for defendant was properly overruled. P. 298 of the opinion:

"'But it is alleged in this case that habitual use as a playground had been made of the premises and transformer house, as the company knew or might easily have known, and in that situation the plaintiff was a licensee, and being there as such, with the acquiescence of the company, it owed him the duty of protection against danger in the transformer house known to the company, to which he might be attracted and to which it might reasonably anticipate he would resort and be injured. (Citing cases) * * *

"The motion to direct a verdict was not well founded, as the evidence fully substantiated the averments of the petition. We note the more prominent facts the evidence proved or tended to prove at the trial."

In *So. Pac. Co.* v. *Marquez* (C. C. A. 9), 44 F. (2d) 286, the plaintiff was a boy of 10 years who was injured while playing on an unguarded turntable, which was easily unlocked, and about which children has been in the habit of playing. Judgment was entered for plaintiff and defendant appealed. The case was affirmed. The court pointed out, p. 286:

"* * * The principal assignment of error is based on the refusal of the court to direct a verdict for the appellant (defendant below) at the close of the evidence."

The court considered the Britt case and the Fruchter case but pointed to the words of Mr. Justice Holmes in

the Britt case ("But the turntable principle if accepted must be very cautiously applied.") as meaning that the turntable doctrine as stated in the Stout case was still applicable to proper facts. The court said, p. 287:

> "Counsel for appellant seems to concede that the issues were properly submitted to the jury under the authority of the Stout and McDonald cases, but earnestly insists that these cases were overruled by the Britt case and by *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U. S. 141, 43 S. Ct. 38, 67 L. Ed. 173. We cannot agree with the latter contention. In the Britt and Fruchter cases the court simply refused to apply the doctrine of the turntable cases to a pond of poisoned water or to electric wires strung twenty-nine feet above the street. The most than can be claimed in that behalf is that the court has declared that the principle involved should be applied with caution, and that the doctrine of the turntable cases should be restricted rather than extended. Further than this the court has never held that a recovery should not be permitted on facts similar to those presented here."

In the case at bar, the child was five years of age; a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do. This was a place where boats docked. Surely, then, it was, as Mr. Justice Holmes said in the Britt case, "something that was certain to attract" a child of 5 years of age, the very age when he would follow "a bait as mechanically as a fish."

Every fact stated in the opening statement was by the motion conceded as true.

The opinions of the Supreme Court and these Circuit Courts of Appeal are in conflict with the case of *Brannan* v. *Wimsatt,* 54 App. D. C. 374, and the opinion in the present case. In the case of *Brannan* v. *Wimsatt, supra,* the Court

of Appeals of the District of Columbia held that the opinion of the Supreme Court in the Britt case wiped out the doctrine of attractive nuisance and that it was no longer basis for an action for negligence in the courts of the District of Columbia.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the District of Columbia, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the proceedings in the case numbered 5768, and entitled on its docket, "*Noah Best, Administrator of the Estate of Albert Edward Best, deceased,* v. *District of Columbia,*" and that the said judgment of the Court of Appeals of the District of Columbia may be reversed, and for such other and further relief as to the Court may seem meet and proper.

NOAH BEST,
Administrator of the Estate of Albert Edward Best, Deceased.
By JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
402 6*th Street, N. W.,*
Washington, D. C.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

Opinion of the Court Below.

The opinion of the Court below is found at pages 9 to 17 of the Record and 61 Wash. Law Rep. 578.

Jurisdiction.

The jurisdiction of this Court is based upon Sec. 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C., Sec. 347). The original date of the judgment of the Court of Appeals is June 30, 1933. (R. 17)

Questions Presented.

The petitioner, Noah Best, as administrator of the estate of his son, Albert Edward Best, filed suit against the respondent, District of Columbia, in the Supreme Court of the District of Columbia. The declaration was based upon the doctrine

of attractive nuisance. After counsel for the petitioner had made his opening statement to the jury, the trial Court, upon motion of counsel for the respondent, directed the jury to return a verdict for the defendant, which was done, and judgement was entered thereon. The Court of Appeals of the District of Columbia affirmed such action of the trial Court and this Court granted a petition for certiorari upon the following questions:

> 1. Upon a given state of facts is a defendant liable for injuries to an infant of five years of age under the doctrine of attractive nuisance?
> 2. Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

Statement of the Case.

The petitioner, Noah Best, filed suit in the Supreme Court of the District of Columbia for the wrongful death of his minor son. The declaration, among other things, alleged that the respondent, District of Columbia, maintained a wharf which was adjacent to a public street, frequented by many people and children; that it was the duty of the municipality (1) to maintain the wharf and its approaches in a manner that might not be peculiarly attractive to children, (2) to maintain barriers to keep out children of tender years, (3) to keep a safe and proper lookout so that children of tender years would not be allured, invited or enticed to come upon the wharf, (4) to keep the wharf in a safe condition. The declaration then alleges a breach of such duties, causing the death of petitioner's intestate, a child of five years, by drowning. (R. 1-3)

The plea of the respondent admitted control and jurisdiction of the place where decedent met his death. The plea did not deny (1) that the intestate was playing on the wharf, (2) that the age of petitioner's intestate was five years, (3) that the intestate was incapable of exercising ordinary care and caution. Under the rules of pleading in the District of Columbia courts, these allegations were deemed admitted. The plea expressly admitted that the wharf was controlled by

the municipality and that it was used for the purpose of storing sand and gravel; it was admitted that the wharf was adjacent to the street. Denial of the other allegations followed, as well as allegations constituting affirmative defenses. (R. 3-5)

After the jury was sworn to try the issues in this case, counsel for petitioner made an opening statement (R. 7-8). This statement set forth that the plaintiff expected to prove that petitioner's intestate was a child of five years of age; that on the date of his death he and other children were playing at a wharf which was operated and controlled by the respondent, the same being located near the place where the boats leave for Norfolk; that the wharf extended over the water and petitioner's intestate fell through one of the many holes therein and was drowned; that the place where the children were, was not fenced off; that it did have some sort of a barrier close to the street* but the side portion of such barrier was down and the children went in and out of that part at their pleasure; that there was no sidewalk upon the street at that point, and the premises of the respondent were immediately adjacent to the street; that the children used the place where petitioner's intestate met his death as a place to play on and play in, and that the respondent maintained such place in a condition that was dangerous to the children thereon and such respondent was to be held responsible for petitioner's intestate having been attracted to the place where he was drowned by reason of the foregoing facts; that this wharf was a place where boats docked and unloaded sand.

After such opening statement was made, counsel for the respondent moved the Court to direct the jury to return a verdict for the respondent, the defendant. Such motion was granted over the exception of the petitioner (R. 8); and such

* The quotation set forth in the bill of exceptions in the Record (R. 7) is an exact copy of the transcript of the stenographer's reports. The punctuation thereof is that of the stenographer. Beginning at the sixth line from the bottom of page 7 of the Record the statement, in order to make sense, should be punctuated as follows:

". . . that it did have some sort of a barrier close to the street—there was no sidewalk—but the side portion was down . . . ."

action of the trial court was assigned as error in the Court of Appeals.

Summary of Argument.

It is the contention of the petitioner that the opening statement to the jury set forth facts constituting a valid cause of action against the respondent under the doctrine of attractive nuisance, and that the doctrine of attractive nuisance is still applicable and still a part of the law of the District of Columbia.

Argument.

The doctrine of attractive nuisance was clearly stated in Union Pac. Ry. Co. *vs.* McDonald, 152 U. S. 262; the court said, p. 279:

> "We adhere to the principles announced in Railroad Co. *vs.* Stout, supra. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pit, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision . . . ."

(p. 280):

> "Referring to the case of Townsend *vs.* Wathen, Judge Thompson in his work on the Law of Negligence, Vol. 1, p. 305 n., well says: 'It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.' Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine."

In United Zinc Co. *vs.* Britt, 258 U. S. 268, the court stated that the reason for the rule there laid down was because there was no evidence (1) that the children could see the attractive nuisance from where they lawfully were; (2) that such sight attracted them to the nuisance. The court said, p. 275:

> "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty."

At page 276 of the opinion, the court pointed out that the facts failed to show that it was the habit of the children to go to the place of the nuisance. The court said:

> ". . . It does not appear that the children were in the habit of going to the place; so that foundation also fails."

In the opening statement in the case at bar, counsel said that the place of the nuisance was right off of the street, on which there was no sidewalk, and the same was maintained by the District as an attractive nuisance; that the side portion of the barrier at the street was down, and that the

children used the place to play on and went in and out of their pleasure. (R. 9)

All three of the exceptions to the rule laid down in the Britt case were met. That case does not govern the case at bar, because the facts were different from the case at bar.

The present action was based upon two sets of facts (1) showing that the children lawfully in the street could see the attractive nusiance because the barrier thereto was down and the same was maintained by defendant and attracted the children there; and (2) the children were in the habit of playing at that place. (R. 9)

The case of New York, N. H. & H. R. Co. *vs.* Fruchter, 260 U. S. 141, the child was injured by an unguarded electric wire after climbing a pole 29 feet in height in order to reach a pigeon's nest. That case is not in point. The Circuit Court of Appeals for the 2d Circuit so states.

In Cole *vs.* Penn. R. Co. (C. C. A. 2) 43 F. (2) 953, 955, the court stated that the reason for the doctrine announced in the Fruchter Case was:

> ". . . on the ground . . . that the doctrine laid down in the Railroad Co. *vs.* Stout, 17 Wall. 657, and Union Pacific Ry. Co. *vs.* McDonald, 152 U. S. 262, did not cover the facts presented."

In the case of Am. Ry. Exp. Co. *vs.* Crabtree (C. C. A. 6) 271 F. 287, 288, the court held that the question of negligence in an action by an administrator for the death of an infant, which action is based upon the doctrine of attractive nuisance, was a question of negligence which must be submitted to a jury.

In the Britt case, the children were 8 and 11 years old, the nuisance was 100 to 120 feet from where the children were. The children in that case and in the Fruchter case had to seek out the nuisance. The case at bar does not come within those facts.

The majority opinion in the Britt case does not expressly reverse the turntable doctrine. To the contrary the court said, p. 275:

> ". . . But the (turntable) principle if accepted must be cautiously applied."

We must determine whether the Britt and Fruchter cases reverse the Stout case, by implication. Various courts have held that they do not.

In Consolidated Lead and Zinc Co. *vs.* Corcoran (C. C. A. 10) 37 F. (2) 296, an attractive nuisance case, the court reversed the case because of the instructions to the jury, but announced the law of the case to govern the second trial. The nuisance was "near and in plain view of the road" (p. 296), "the children were in the habit of playing about the nuisance" (p. 296). In speaking of the effect of the opinion in the Britt case, the court said, p. 297:

> ". . . That case distinguished Railroad Co. *vs.* Stout, 17 Wall. 657 . . . and Union Pacific Railway *vs.* McDonald, 152 U. S. 262 . . . . Both of those cases are more nearly applicable here. The Britt case was essentially different in the facts, which were held not to impose the duty of care. The court said: 'There can be no general duty on the part of the landowner to keep his land safe for children, or even free from hidden dangers,' but was careful to add, 'if he had not directly or by implication invited or licensed them to come there.' The case (Zinc Co. *vs.* Britt) is obviously not in point."

The court then held that the facts alleged in the declaration were proved and that the motion to direct a verdict for defendant was properly overruled. P. 298 of the opinion:

> "But it is alleged in this case that habitual use as a playground had been made of the premises and transformer house, as the company knew or might easily have known, and in that situation the plaintiff was a licensee, and being there as such, with the acquiescence of the company, it owed him the duty of protection against danger in the transformer house known to the company, to which he might be attracted and to which it might reasonably anticipate he would resort and be injured. (Citing cases) . . .
>
> "The motion to direct a verdict was not well founded, as the evidence fully substantiated the averments of the petition. We note the more prominent facts the evidence proved or tended to prove at the trial."

In So. Pac. Co. *vs.* Marquez (C. C. A. 9) 44 F. (2d) 286, the plaintiff was a boy of 10 years who was injured while playing on an unguarded turntable, which was easily unlocked, and about which children had been in the habit of playing. Judgment was entered for plaintiff and defendant appealed. The case was affirmed. The court pointed out, p. 286:

> ". . . The principal assignment of error is based on the refusal of the court to direct a verdict for the appellant (defendant below) at the close of the evidence."

The court considered the Britt case and the Fruchter case but pointed to the words of Mr. Justice Holmes in the Britt case ("But the turntable principle if accepted must be very cautiously applied.") as meaning that the turntable doctrine as stated in the Stout case was still applicable to proper facts. The court said, p. 287:

> "Counsel for appeallant seems to concede that the issues were properly submitted to the jury under the authority of the Stout and McDonald cases, but earnestly insists that these cases were overruled by the Britt case and by New York, N. H. & H. R. Co. *vs.* Fruchter, 260 U. S. 141, 43 S. Ct. 38, 67 L. Ed. 173. We cannot agree with the latter contention. In the Britt and Fruchter cases the court simply refused to apply the doctrine of the turntable cases to a pond of poisoned water or to electric wires strung twenty-nine feet above the street. The most that can be claimed in that behalf is that the court has declared that the principle involved should be applied with caution, and that the doctrine of the turntable cases should be restricted rather than extended. Further than this the court has never held that a recovery should not be permitted on facts similar to those presented here."

In the case at bar, the child was five years of age; a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do. This was a place where boats docked. Surely, then, it was, as Mr. Justice Holmes said in

the Britt case, "something that was certain to attract" a child of 5 years of age, the very age when he would follow "a bait as mechanically as a fish."

Every fact stated in the opening statement was by the motion conceded as true.

The opinions of the Supreme Court and these Circuit Courts of Appeal are in conflict with the case of Brannon *vs.* Wimsatt, 54 App. D. C. 374, and the opinion in the present case. In the case of Brannon *vs.* Wimsatt, supra, the Court of Appeals of the District of Columbia held that the opinion of the Supreme Court in the Britt case wiped out the doctrine of attractive nuisance and that it was no longer basis for an action for negligence in the courts of the District of Columbia.

In the District of Columbia it is settled law that the trial court has the right to direct a verdict for the defendant upon the opening statement of plaintiff's counsel to the jury. However, as stated in the case of Hornblower *vs.* George Washington University, 31 App. D. C. 64, 71:

> ". . . The trial court, however, should not exercise this power unless it clearly appears from the plaintiff's own statement that he cannot recover. This is a conclusion that trial courts rarely reach, and a rule that should not be applied except in cases where the statement clearly shows that no cause of action exists."

It is settled law that a party making a motion to direct admits that the allegations made against him are true even in their most unfavorable construction.

The allegations in the opening statement made out a case of attractive nuisance under the decisions of the Courts.

Conclusion.

The questions presented should be answered in the affirmative.

Respectfully submitted,

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Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF Albert Edward Best, deceased, petitioner

vs.

DISTRICT OF COLUMBIA, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT

The petitioner's case rests entirely upon the facts contained in the opening statement to the jury (R. 9). The Supreme Court of the District of Columbia held these insufficient to warrant a submission of the case. The Court of Appeals affirmed this judgment.

Petitioner's counsel advised the court by the opening statement that he would prove the following facts: (1) that this place (wharf) was not fenced; (2) that the wharf contained holes and that the petitioner's intestate fell through one of the holes; (3) that children used this place to play on and play in; and (4) that the District, having

maintained the wharf in such a condition that it was dangerous to the life of children, was thereby responsible for children having been attracted there; (5) that there was a barrier close to the street and a watchman arrived after the accident. The opening statement did not contain any assertion that the District of Columbia permitted children to play on the wharf. It further disclosed that the wharf is no part of the public highway; that it is located on private property of the District of Columbia and is not a place to which the public is admitted but one where boats dock and unload sand, which is removed by the District. Nor did counsel in his opening statement advise the court that children could see the wharf from the public highway.

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISIONS OF THE FEDERAL CIRCUIT COURTS

There is no conflict between the decision of the Court of Appeals and the various circuit courts of appeals on the doctrine of attractive nuisance. Thus the following cases when analyzed are in accordance with the doctrine and principles announced by this Court and followed by the Court of Appeals.

Cole vs. *Penna. R. Co.* (C.C.A. 2), 43 F. (2) 953, 955.

Consol. L. & Z. Co. vs. *Corcoran* (C.C.A. 10), 37 F. (2) 296, 297, 298.

So. Pac. Co. vs. *Marquez* (C.C.A. 9), 44 F. (2) 286, 287.

In *Consolidated Lead and Zinc Co.* vs. *Corcoran*, 37 F. (2) 296, the facts disclose that the plaintiff was injured due to the carelessness of the defendant in permitting a transformer house and equipment to remain open when same had not been used for several months, and permitted children to play in the said house, which was located within a few feet of a public road and a short distance from a public school. There was no watchman present to advise the children of the high-tension wires and the danger thereof. There was no fence between the roadway and the transformers. In the case at bar there was a barrier, or fence, between the highway and the private property, and there was a watchman stationed at the yard, who was not present at the time of the accident, due to the fact that it occurred early on Sunday morning. The only persons lawfully admitted to the District wharf were those having business there.

In *Cole* vs. *Penna. R. Co.* (C.C.A. 2), 43 F. (2) 953, 955, the case was one to recover damages for the destruction of the plaintiff's property by a fire caused through the negligent act of the railroad company in the operation of its engines and maintenance of its right-of-ways. This case is absolutely valueless on the proposition of attractive nuisance. The opinion does not discuss this doc-

trine and a mere reference to the facts will disclose its complete inapplicability to the question presented by the petition herein.

The case of the *Southern Pacific Co.* vs. *Marquez,* (C.C.A. 9), 44 F. (2) 286, 287, was one for damages for injuries sustained by an infant plaintiff on a railroad turntable which was located 40 or 50 feet from a public highway and in plain view thereof. The facts in that case are so dissimilar to the ones presented by the record in this case that conceding, without admitting, that the decision was correct in that case, it it not in conflict with the decision of the Court of Appeals in the case at bar, nor controlling upon the question.

The Courts have consistently refused to permit recovery for injuries sustained by an infant who enters the land of another and is injured or meets his death by reason of the storage of articles upon the land, or the presence of water, artificial or natural, on the property of the landowner.

II

THE QUESTION PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI IS SOLELY A LOCAL ONE, AND THE DECISION OF THE COURT OF APPEALS IS NOT OF SUCH IMPORTANCE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI

The Court of Appeals in its opinion in this case adhered to its former decisions in cases on the so-called doctrine of "attractive nuisance." The prior decisions of the Court of Appeals, which held nonliability in cases of attractive nuisance, are:

Sullivan vs. *Huidekoper,* 27 App.D.C. 154.

McGraw vs. *District of Columbia,* 3 App. D.C. 405.

Hegeage vs. *District of Columbia,* 42 App. D.C. 109.

Branan vs. *Wimsatt,* 54 App.D.C. 374.

The *Sullivan* vs. *Huidekoper case,* supra, was decided subsequent to the decisions of this Court in the "turntable" case, *Sioux City and P. R. Company* vs. *Stout,* 17 Wall. 657, 21 L. ed. 745, and the "slack pit" case, *Union P. R. Co.* vs. *McDonald,* 152 U.S. 262, 38 L. ed. 434. In its opinion the Court of Appeals discussed in detail the turntable and slack pit cases, and held that the decisions of this Court did not apply to the facts in the case under consideration. The Court of Appeals also reviewed and quoted with approval from the following Federal and State cases:

McCabe vs. *American Woolen Co.,* 124 Fed. 283.

Peters vs. *Bowman,* 115 Cal. 345.

Stendal vs. *Boyd,* 73 Minn. 53, 42 L.R.A. 288.

Gillespie vs. *McGowan,* 100 Pa. 144, 45 Am. Rep. 365.

The decision of the Court of Appeals in the *Branan* vs. *Wimsatt case,* supra, was decided subsequent to the decision of this Court in the case of *United Zinc Co.* vs. *Britt,* 258 U.S. 268.

The Court of Appeals in all of its decisions has consistently held that there was no liability upon

a defendant property owner where a child, being a trespasser, was injured while playing upon the property of defendant.

The two recent decisions of this Court, *United Zinc and Chemical Company* v. *Britt*, 258 U.S. 268, and *N. Y. N. H. & H. R.R. Co.* v. *Fruchter*, 260 U.S. 141, both hold the defendant not liable where the plaintiff, a minor, was injured. The Britt case is a great deal more in point with the case at bar. The plaintiff's intestate there met his death while wading in a pool of clear water approximately one hundred feet from the roadway. The Court, at page 275 said, "infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon land owners to expect them and prepare for their safety."

In the *Fruchter case, supra,* this Court held that the Railroad Company charged with the maintenance of a bridge was not responsible for an accident occurring to a child eight years of age who was injured while climbing upon the same.

From a careful consideration of the above cases as well as the recent decision of the Court of Appeals in the *Branan* v. *Wimsatt case,* 54 App. D.C. 374, it may now be safely said that the courts have limited the doctrine of attractive nuisance to "turntables" and "slack pits." Justice Holmes, in the *Britt case,* in referring to the "turntable" case said:

> "But the doctrine (turntable) needs very careful statement not to make an unjust and impracticable requirement."

and also, on page 276, the Court said:

> "there can be no general duty on the part of a land owner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

To hold the municipality liable in this case would, in effect, require the entire water front along the Potomac River, as well as both sides of the Eastern Branch and the Chesapeake and Ohio Canal to be boarded off, with a guard stationed at each entrance to the enclosure. It is submitted that a building in the course of construction is just as attractive to children as a wharf. It is a place where they may play and "take chances." Every contractor and builder must erect a substantial fence around the construction work if the appellant is to be permitted to recover in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF Albert Edward Best, Deceased, petitioner

v.

DISTRICT OF COLUMBIA, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Court below is found on pages 10 to 17 of the Record and 61 Wash. Law. Rep. 578.

QUESTION PRESENTED

The question presented is whether the facts announced in the opening statement of petitioner's counsel, if proved, were sufficient to sustain a verdict.

ADDITIONAL STATEMENT OF THE CASE

Petitioner's counsel on page 2 of the brief, in the second sentence under the heading "Statement of the Case" asserts: "The declaration, among other things, alleged that the respondent, District of Columbia, *maintained a wharf which was adjacent to a public street, frequented by many people and children;* * * *". (Italics supplied.) This is not the fact because the declaration (R. 1.) does not have a comma after the word "street". The placing of the comma after the word "street" would indicate that the clause "frequented by many people and children" referred to the wharf, when without the comma, as was alleged in the declaration, it refers to the street. Thus counsel for petitioner, by the insertion of a comma, attempts to have the clause "frequented by many people and children" refer to the wharf instead of the public street as was the fact alleged in the declaration.

The note on page 3 of petitioner's brief explains that the bill of exceptions contains the punctuation of a court stenographer. The bill of exceptions was drawn by petitioner's counsel, approved by both counsel, and signed by the Court. The bill of exceptions states the true facts.

On page 3 and the bottom of pages 5 and 8 of the petitioner's brief certain additions and omissions to the counsel's opening statement are set forth. Thus at page 5 of the petitioner's brief he

says "that the place of the nuisance was right off the street" and "the side portion of the barrier *at* the street was down * * *". On page 8 we find "a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do." These statements are not consistent with the Record and rather than point out the inconsistencies and those appearing on page 3 of his brief, the opening statement, being short, is herewith set forth for the convenience of the Court (R. 7 and 8):

> * * * that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there

on this morning and while in there fell through one of the holes in this wharf.

That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole.

* * *

That this wharf is not part of the public highway but is on private property of the District of Columbia, and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District.

Counsel for petitioner also states on page 2 of his brief that under the rules of pleading certain allegations of the declaration were deemed admitted because of no denial in the plea. Law Rule No. 29 of the Supreme Court of the District of Columbia, in force at the time of the filing of the declaration and the trial of the cause provided:

Every material allegation of fact in a pleading, other than of value or amount of damage, which is not denied by the adverse party, shall be deemed to be admitted, unless the latter avers that he had no knowledge or

> information thereof sufficient to form a belief, in which case it shall be deemed to be denied.

Defendant's plea (R. 5) contained the following:

> And as to each and every other allegation of fact in the said declaration, defendant avers that it has no knowledge or information thereof sufficient to form a belief * * *.

This clearly amounts to a denial under the Rules of Court and counsel was in error when he stated that the allegations contained at the bottom of page 2 of his brief were admitted.

SUMMARY OF ARGUMENT

I. The facts contained in the opening statement, if proved, would not warrant the submission of the cause to the jury.

II. The doctrine announced in the "Turntable" case *Sioux City and P.R. Co.* v. *Stout,* 17 Wall. 657, 21 Law Ed. 745, and the "Slack pit" case, *Union P. R. Co.* v. *McDonald,* 152 U.S. 262; 38 L. Ed. 434, is not applicable to the case at bar.

III. The directing of the verdict by the Trial Justice at the conclusion of the opening statement was proper and in accordance with the approved procedure.

I

THE FACTS CONTAINED IN THE OPENING STATEMENT, IF PROVED, WOULD NOT WARRANT THE SUBMISSION OF THE CASE TO THE JURY

To make out a case against respondent under the doctrine of attractive nuisance it was necessary for the petitioner to show:

1. The injured child was too young to understand and avoid the danger.

2. The danger was a latent one.

3. The danger was a place where children had a right to be and there was reason to anticipate the presence of children.

4. There was a strong likelihood of the accident.

5. The danger was one other than those ordinarily encountered.

6. The precautions not taken were such as a reasonable and prudent person would have taken under the circumstances.

The facts offered to be proved by Counsel in the opening statement were:

1. There was no sidewalk on that side of the street (R. 7). This indicates that there were no facilities for pedestrians.

2. There was some sort of a barrier close to the street (R. 7), indicating that persons were not invited or permitted to enter the District property at the end of which was located the wharf.

3. The wharf is not a part of the public highway but is on private property of the District of Columbia (R. 8).

4. The wharf where petitioner's intestate met his death and adjoining District property *is not a place to which the public was admitted* (R.).

There was a complete failure to prove the following essential facts:

1. The wharf could be seen from the public space.

2. That the child was attracted by the presence of the wharf itself, or any article or thing which may have been upon the wharf.

3. That there was any latent or hidden danger at the place where the petitioner's intestate met his death.

4. That there was ever a prior accident to children at or near this wharf.

5. That respondent invited or permitted petitioner's intestate or other children to enter or play on its wharf (R. 7 and 8).

If counsel had any evidence whatever to prove these facts he would have certainly so stated. From his failure, it must be assumed the evidence would not have proven these facts.

The statement that "children went in and out at their pleasure" (R. 7) and that "children used this place to play on and play in * * *" (R. 8) is not enough to show an invitation or permission on behalf of the respondent. *Nowhere was it stated that respondent permitted children to play on the wharf of the District property. Nowhere was it stated that the District of Columbia knew*

that the children used the property to play on or play in. Nowhere was it stated that the conduct of the children was such as to create a constructive notice to the respondent.

The accident occurred on Sunday morning. Counsel, in his opening statement asserted that "there was no one there *at that time to keep children away, and that the watchman who was stationed there arrived some time after this occurrence.*" There is only one inference to be obtained from this statement and that is, that the watchman would have prevented the children from coming upon the premises, and the fact that the wharf "is not a place to which the public is admitted" definitely negatives any permission or invitation to a five-year-old child to play on the wharf on a Sunday morning.

The leading case in the District of Columbia, and one similar in point of fact, is *Sullivan* v. *Huidekoper,* 27 App. D.C. 154. The declaration in that case alleged that the defendant was the owner of a parcel of land near the intersection of 37th and W Streets, Northwest, over which flowed two small streams of water. The streets were so constructed that they acted as a dam to the water flowing over the land thereby causing a pond to be formed of a size about 250 feet long by 90 feet wide, with a depth varying from 6 to 10 feet, and its bottom was covered by a dangerous, muddy and sticky mire two feet in thickness; that in the immediate vicin-

ity of and surrounding the land were the residences of a large number of persons, including many children of a tender age, and that the pond was attractive to children, many of whom were and had been for a number of years accustomed to play about and wade and swim in it. *There was no fence around the pond, and all of these facts were known to the defendant.* The plaintiff's intestate was ignorant of the dangerous character of the pond, and went to the lot with other children and fell or went into the said pond and was drowned. A demurrer was filed to the declaration, sustained by the Trial Court, and its ruling was sustained by the Court of Appeals.

It will thus be seen that in the *Sullivan case supra,* the grounds of negligence were much stronger than those in the case at bar, as the pond was immediately adjacent to the street, and caused by the construction of the streets. In this case the river was some distance away, exact distance not being shown; in the *Sullivan case* the pond was visible from the public highway; in this case such fact was not stated; in the *Sullivan case* there was no fence or barrier, in this case there was some sort of a barrier close to the street; in the *Sullivan case* the defendant was aware of the fact that the children played in and about the pond, in this case there is no allegation of notice, and in fact, the public was not admitted to the property in question, but the same was used for the unloading of sand from the river boats.

The Court after referring to and distinguishing the "turntable" case, *sioux City and P. R. Co.* v. *Stout,* 17 Wall. 657, 21 Law Ed. 745, and the "slack pit" case, *Union P. R. Co.* v. *McDonald,* 152 U.S. 262, 38 L.Ed. 434, said (p. 159):

> * * * To hold an owner of real estate, upon which there is a body of water, liable for the accidents that may happen to children while trespassing thereon, would be to place upon them an unfair burden. The danger is one that cannot be guarded against without considerable expense or inconvenience.
>
> The cases holding that there is no duty upon the part of a real estate owner, upon whose land is a pond or other body of water to keep his land safe for trespassers even when those trespassers are children, seem to us to be founded upon and supported by reason and common sense. *The primary duty to guard and protect a child against patent and unconcealed dangers devolves upon the parent, and not upon a stranger.* (Italics ours.)

In *McCabe* v. *American Woolen Co.,* 124 Fed. 283, affirmed in 65 C.C.A. 59, 132 Fed. 1006, the court sustained a demurrer, and held the declaration insufficient, where it appeared that the defendant maintained an unguarded mill trench, having precipitous banks, near the house of the father of the child, who fell in and was drowned. The court, while recognizing the Stout and Mc-

Donald cases, said: "The case at bar, however, is essentially distinct in this particular. This canal was permanent, open, and plain to view—as much so as though it had been a natural stream—and suggests nothing whatever which would change the relations of the parties from what they would have been had it been a brook or a river. If the defendant is to be holden to this plaintiff for not especially guarding it, then the customs of the community must be changed throughout, because it is impossible to distinguish this canal, for the purposes of this case, from a river or a brook, a haymow, an ox cart left in a farmer's yard, a high ledge, or a field trench about either of which children may happen to be accustomed to play. We think, therefore, that this canal was an object of such a character that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done. Therefore, on account of the various distinctions which we have pointed out, and the reasons which we have stated, this suit cannot be maintained."

The Supreme Court of California, in *Peters* v. *Bowman,* 115 Cal. 345, laid down the following rule concerning liability of a defendant for an open and unguarded river, lake, or other body of water.

It appeared the defendant permitted a pond to remain on his premises unguarded and unfenced.

Children played upon it, and one of them, while floating on a raft, fell and was drowned. The Court, recognizing and approving the "turntable" case, said:

> A body of water, either standing as in ponds or lakes, or running as in rivers and creeks, or ebbing and flowing as on the shores of seas and bays, is a natural object incident to all countries which are not deserts. Such a body of water may be found in, or close to, nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners which could compel one owning land upon which such water, or part of it, stands or flows, to fill it up or surround it with impenetrable wall.
>
> On a petition for a rehearing, it was said: "* * * A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot * * * would answer the purpose: and, therefore, to make it safe, it must either be filled or drained. * * * But ponds are always useful, and often necessary. * * * Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle, must the owner of a fruit tree be held liable for the death or injury of a child who, at-

> tracted by the fruit, climbs into the branches and falls out? But this, we imagine, is an absurdity, for which no one would contend; and it proves that the rule of the turntable cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."

In the case of *City of Baltimore* v. *Palma,* 137 Md. 179 (1920) the Court of Appeals of Maryland held the doctrine of attractive nuisance not applicable to the case of a child injured while playing on a lumber pier. The facts disclosed that persons who "had business relations" with the parties occupying the pier were permitted thereon. Other persons were not. It appears further, however, that children frequently played upon the pier and other children were playing upon the pier or wharf at the time of the injury to the plaintiff. The lower court permitted a recovery. The Court of Appeals reversed the same, holding nonliability on the part of the Municipality. This case is par-

ticularly important, not only from the standpoint that it holds nonliability of a city under almost identical facts as those presented in the case at bar, but also because the Common Law of the District is the same as that of Maryland by the force of Sec. 1 of the District of Columbia Code, which provides that the Common Law in force in Maryland on the 27th day of February 1801, and not inapplicable to the District of Columbia, shall remain in force unless inconsistent with the remaining sections of the Code. The Maryland Court at pages 188 and 189 of its opinion quoted with approval the case of *Birch* v. *City of New York,* 190 N.Y. 397. In the Birch case a boy fell through a hole in the wharf owned by the city. Various persons used the wharf for fishing and bathing, and several contractors used it for unloading cargoes of bricks and building materials. The plaintiff, after alighting from a boat at the pier fell through a hole in the wharf. The New York Court of Appeals held nonliability.

The opinion of the Maryland Court of Appeals in the above case was cited with approval in the recent case of *Lease* v. *Bealmear,* 130 Atl. 66, where the Court held nonliability when an infant plaintiff fell by reason of a loose board on the second floor of a building under construction.

In *Trogia* v. *Butte Mining Company,* the Circuit Court of Appeals of the Ninth Circuit, 270 Fed. 75 (1921), held nonliability for the drowning of

a child in a pool maintained upon the defendant's premises. The Court said the rule in the turntable case is the extreme expression of the duty of a landowner to keep his premises in a safe condition.

See Also:

Savannah, Florida and Western Railroad v. *Beavers,* 113 Ga. 398.

Zamaria v. *Davis, Director General,* 284 Pa. 524 (1925).

Thompson v. *Baltimore & Ohio R. R.,* 218 Pa. 444.

Beichert, Infant, v. *G. M. Laboratories, Inc.,* 242 N.Y. 168 (1926).

Lineburg v. *City of St. Paul,* 71 Minn. 245.

In the case of *Stendal* v. *Boyd,* 73 Minn. 53, 42 L.R.A. 288, that Court, in holding the defendant not liable in an attractive nuisance case, said:

> The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills

> with water, so that children cannot reach it—a well-nigh impossible task—why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children?

The Court of Appeals in the case of *Sullivan* v. *Huidekaper,* supra, gave its approval to the following quotation from the decision of the Supreme Court of Pennsylvania in *Gillespie* v. *McGowan,* 100 Pa. 144, 45 Am. Rep. 365:

> Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to enclose it or fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass especially where there is tempting fruit, yet I never heard that it was the duty of an owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches.

To hold the municipality liable in this case would, in effect, require the entire water front along the Potomac River, as well as both sides of the Eastern Branch and the Chesapeake and Ohio Canal to be boarded off, with a guard stationed at each entrance to the enclosure. It is submitted that a building in the course of construction is just as attractive to children as a wharf. It is a place where they may play and "take chances." Every contractor and builder must erect a substantial fence around the construction work if the appellant is to be permitted to recover in this case.

In the case of *Hegeage* v. *District of Columbia,* 42 Appeals, D.C., 109, the Court of Appeals reaffirmed the former rulings of the Court in the *McGraw* v. *District of Columbia case,* 3 App. D.C. 405, and *Sullivan* v. *Huidekoper,* 27 App. D.C. 154, and in its opinion the Court said:

> In the present case there was nothing inherently dangerous either in this alley or in the fact that the embankment wall along its southern side was not guarded. Children had played there for a considerable time apparently without mishap. Conditions were observable by all. If the District is to be held liable in this case, then it necessarily follows that it is its duty to fence every pond and every stream, and make absolutely safe every foot of ground under its jurisdiction, when children are liable to resort thereto.

It cannot be contended that the appellant's intestate was lawfully at the point where the fatal accident occurred. *The Record discloses that the wharf was on private property of the District and no part of the highway, and is not a place to which the public is admitted* (R. 8).

The most recent decision of the Court of Appeals of the District of Columbia is that of *Branan* v. *Wimsatt,* 54 App. 374. In that case a young child was climbing up the side of a lumber pile with other children when several boards became displaced, and fell upon her causing severe injuries. The Wimsatt lumber yard is located but a short distance from the District sand wharf. Children had played in the Wimsatt Lumber yard for a long time prior to the accident. The Court held nonliability on the part of the defendant and in its opinion said:

> Licensees enter upon the premises of another for their own interest, convenience, or gratification, and at least assume the risk of unconcealed dangers which are natural to the place, and which can be avoided by proper care. *Burchell* v. *Dickisson,* 50 L.J.Q.B. (N.S.) 101, 102; *Beehler* v. *Daniels,* 18 R.I. 563, 29 Atl. 6, 27 L.R.A. 512, 49 Am. St. Rep. 790; *Reardon* v. *Thompson,* 149 Mass. 267, 21 N.E. 369; *Schreiner* v. *Great Northern R. Co.,* 86 Minn. 245, 247, 90 N.W. 400, 58 L.R.A. 75; *Eisenberg* v. *Mo. Pac. R. Co.,* 33 Mo. App. 85, 90, 91; *Albert* v. *New York,* 75 App. Div. 553, 556, 557, 78 N.Y.

Supp. 355; *United Zinc Co.* v. *Britt,* 258 U.S. 268, 275, 42 Sup. Ct. 299, 66 L. Ed. 615.

We now come to the consideration of whether an invitation to enter may be implied from frequent entrance and user. The most that can be implied from entrance and user is a bare permission. A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation that that of mere licensor and licensee. *Plummer* v. *Dill,* 156 Mass. 426, 427, 31 N.E. 128, 32 Am. St. Rep. 463; *McCoy* v. *Walsh,* 186 Mass. 369, 370, 371, 71 N.E. 792; *Evansville & Terre Haute* v. *Griffin,* 100 Ind. 221, 223, 50 Am. Rep. 783; *Furey* v. *N. Y. Central & Hudson R.R. Co.,* 67 N.J. Law. 270, 276, 51 Atl. 505.

Persons engaged in business may be considered as inviting the public to do business with them, and to enter their stores or places of business for that purpose; but it can hardly be said that that invitation is broad enough to include those who have no business to transact, and enter from curiosity or for their own interest, convenience, or gratification. *Severy* v. *Nickerson,* 120 Mass. 306, 307, 308, 21 Am. Rep. 514; *Ryan* v. *Towar,* 128 Mich. 463, 87 N.W. 644, 55 L.R.A. 310, 92 Am. St. Rep. 481; *Plummer* v. *Dill,* 156 Mass. 426, 427, 428, 31 N.E. 128, 32 Am. St. Rep. 463; *McEachern* v. *Boston & M. P. Co.,* 150 Mass. 515, 516, 517, 23 N.E. 231; *Reardon* v. *Thompson,* 149 Mass. 267, 21 N.E. 369; *Paolino* v. *McKendall,* 24 R.I.

432, 435, 53 Atl. 268, 60 L.R.A. 133, 96 Am. St. Rep. 736. Neither can it be said that an owner who tolerates a trespass, and who takes no steps to interfere with the practice, has impliedly extended an invitation to either invade or use his premises. *Evansville & Terre Haute* v. *Griffin, supra,* 223, 224; *Furey* v. *N. Y. Central & Hudson R.R. Co.,* 67 N.J. Law, 270, 274, 275, 51 Atl. 505.

* * * To hold that owners are bound to prevent children from swimming in ponds, entering buildings in course of construction, climbing fruit trees, rock piles, or fences, and from trespassing on property not inherently dangerous, or dangerous at all if properly used, would subject such property owners to an intolerable burden, and impose upon them a duty which would require almost superhuman vigilance to perform. *Loftus* v. *Dehail,* 133 Cal. 214, 65 Pac. 379, 380; *Gillespie* v. *McGowan,* 100 Pa. 144–150, 45 Am. Rep. 365. The duty devolves on natural guardians and lawful custodians to protect children from the consequences of their restless spirit of adventure, and that duty cannot justly be wholly transferred to strangers, who are under no obligation to keep watch and ward over the children of others. *Tomlinson* v. *Vickburg R. Co.,* 143 La. 641, 642, 79 South. 174; *Sullivan* v. *Huidekoper,* 27 App. D.C. 154, 5 L.R.A. (N.S.) 263, 7 Ann. Cas. 196.

* * * * *

> Whether the principle established by the earlier decisions is still in force, the facts of this case do not require us to decide, although it may well be doubted whether those decisions can be reconciled with the later ruling. We do say, however, that we are under no obligation to extend the doctrine declared in *Railroad Co.* v. *Stout* to property or children not of the class contemplated by the court in that case.
>
> * * * If the owner of a deadly pool be not responsible to children who use it for a purpose for which it seems to be fit, certainly the owner of an everyday lumber yard should not be held answerable for injuries to minors who, knowing the danger, devote his lumber piles to a use for which they were not designed or suitable.
>
> The appellee was not bound to hire guards to exclude the children from his premises, or to employ a supervisor to control their playful activities, or to so arrange his lumber yard that it might be safely used for games of tag or hide and seek. *Powers* v. *Owego Bridge Co.*, 97 App. Div. 477, 89 N.Y. Supp. 1030, 1031; *United Zinc Co.* v. *Britt, supra,* 275 (42 Sup. Ct. 299).

Petition for writ of certiorari was denied by this Court June 9, 1924, 265 U.S. 591, 68 L. ed. 1195.

Several of the state Courts have held that an infant injured on an unlocked and unguarded turntable is not entitled to recovery.

The Supreme Judicial Court of Massachusetts in the case of *Daniels* v. *New York and New England Railroad Co.,* 154 Mass. 349, held nonliability in case of turntable located 600 feet from a public street.

This case was followed and approved in the case of *Walker, Admr.* v. *Potomac, Fredericksburg Railroad Co.,* 105 Va. 226. The Supreme Court of Appeals of Virginia held there was no liability on the part of the railroad maintaining a turntable about 360 feet from a public road, even though the turntable had been used by children to play on, and this fact was known to the agent of the railroad company. The Court held that before the plaintiff could recover it must appear that the defendant company owed his intestate some duty which it failed to discharge, and where there is no duty there can be no negligence.

To the same effect is the case of *Walsh, an Infant,* v. *The Fitchburg Railroad Co.,* 145 N.Y. Rep. 301. The opinion was delivered by Mr. Justice Peckham, later appointed to the Supreme Court of the United States.

Also in the case of *Conrad* v. *Baltimore & Ohio R.R. Co.,* the Supreme Court of Appeals of West Virginia in 1908 declared nonliability on the part of a defendant where the plaintiff was injured due to an unlocked, unfastened and unguarded turntable located in a thickly settled community near a public street, and on ground on which children congregated

to play. The Court held that the doctrine of the turntable case had been repudiated in the Courts of Massachusetts, New York, New Hampshire, New Jersey, Texas, Pennsylvania, Ohio, Virginia, and West Virginia.

In the cases where a recovery has been permitted on the doctrine of attractive nuisance the courts have required the plaintiff to show substantially that the place or thing causing the injury was inherently dangerous; that such danger was known to the defendant, and not known to the plaintiff, and its dangerous qualities were not apparent; that the plaintiff was at the place of danger with the permission or invitation, expressed or implied, of the defendant.

It may be well to consider whether the ruling in many of the earlier cases on the doctrine of attractive nuisance are now applicable due to the changed conditions in practically all urban communities. Fifty or one hundred years ago children residing in cities were compelled to play at such places as they were able to seek, while today, the government expends large sums of money in acquiring property and equipment for large and extensive playgrounds, and maintaining same, where children may indulge in play and sports with a minimum amount of danger. These playgrounds are located adjacent to practically all the public schools and at other points throughout the city.

II

THE DOCTRINE ANNOUNCED IN THE "TURNTABLE" CASE, *SIOUX CITY AND P. R. CO.* v. *STOUT*, 17 WALL. 657, 21 LAW ED. 745, AND THE "SLACK PIT" CASE, *UNION P. R. CO.* v. *McDONALD*, 152 U.S. 262; 38 L. ED. 434, IS NOT APPLICABLE TO THE CASE AT BAR

In the turntable case, *supra,* the injury was occasioned by dangerous machinery on which children had been permitted to play, and the danger of injury to a child was not apparent. The slack pit case, supra, presented a condition equally dangerous as the turntable case. In the slack pit case an undisclosed fire was permitted to burn contiguous to a path over which children were permitted to walk with the consent of the defendant. There was a violation of a statute which required the slack pit to be fenced. For the convenience of the Court there is herewith set forth the more important differences or distinctions between the case at bar involving a wharf and the turntable and slack pit cases:

Turntable case	Slack pit case	Wharf case
In open space	No fence or guard	Barrier at street.
Children had played on turntable while defendant's employees were present.	Children allowed at mine and path near slack pit.	Never played or permitted on premises when D.C. employees present.
Turntable—dangerous machine.	Slack pit—dangerous	Wharf—not dangerous.
Latent danger	Latent danger	Patent danger.
	Statute required fencing of slack pit.	Public not permitted on wharf or adjoining District property.

In *Sioux City and P. R. Co.* v. *Stout, supra,* the Court at page 663 said:

> The evidence is not strong and the negligence is slight but we are not able to say that there is not evidence sufficient to justify the verdict.

It is respectfully submitted that the case at bar should be controlled by the decision of this Court in *United Zinc Co.* v. *Britt,* 258 U.S. 268. The court there held nonliability on the part of the owner of premises upon which existed a pool of deadly poisonous waters although outwardly presenting an appearance of complete safety. The Court therein stated (page 275):

> Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon the landowners to expect them and to prepare for their safety.

And also at page 276 the Court said:

> * * * There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there.

The decision of this Court in *N.Y., N.H. and H. R.R. Company* v. *Fruchter,* 260 U.S. 141 holds nonliability of a defendant for injuries sustained by an eight-year-old child who climbed to the top of a bridge and came in contact with an electric wire.

It should not be lost sight of that the danger in the case at bar was open and apparent and one which a five-year-old child would ordinarily avoid.

In the *Britt case, supra,* the danger was not apparent. In fact it was attractively disguised. A great many cases are referred to in the briefs and arguments in the *Britt case, supra.* This question has also been the subject of much annotations, 36 A.L.R. 1 to 294, and 45 A.L.R. 973 to 993.

It is submitted that the tendency of the Court is now to limit the doctrine of attractive nuisance to dangerous machinery, contrivances or places which present a situation of apparent safety but in fact are actually dangerous, coupled with a permission or invitation to children to play at the place in question.

In *Erie R.R. Co. v. Duplak,* 286 U.S. 441, a five-year-old boy was injured while playing upon a railroad bridge. A state statute made it unlawful "for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; * * *". The lower court permitted a recovery. This Court reversed the decision on the ground of nonliability in view of the statute. The Court at pages 443 and 444 of the opinion, in discussing the question and in referring to previous cases, said:

> "The statute", this court said (p. 101), "seemingly adopts in an unqualified form the policy of the common law as understood

we believe, in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

III

THE DIRECTING OF THE VERDICT BY THE TRIAL JUSTICE AT THE CONCLUSION OF THE OPENING STATEMENT WAS PROPER AND IN ACCORDANCE WITH THE APPROVED PROCEDURE

Petitioner's counsel, at page 9 of his brief, refers to the case of *Hornblower* v. *George Washington University,* 31 App. D.C. 64, which case holds that a trial justice has the right, in fact, it is his duty, to direct a verdict upon the insufficiency of facts set forth in an opening statement. The Court stated that such a decision is not the one ordinarily reached, but is proper where the opening statement clearly shows that no cause of action exists. The Court did not say that a directed verdict should not be granted upon an insufficient opening statement. The Court, in that case, affirmed the judgment of the trial court where a verdict for the defendant was directed upon an opening statement.

The petitioner did not assign as error in the lower court nor was there any reference in the briefs or argument of counsel for either party in

the Court of Appeals of the procedure followed by the trial justice in directing a verdict. Apparently, counsel referred to *Hornblower* v. *George Washington University, supra,* by reason of the following language contained in the opinion of the Court of Appeals (R. 11 and 12):

> We cannot commend the procedure adopted by counsel for the defendant in filing the motion for a directed verdict at the close of plaintiff's statement to the jury. The motion raises issues which could properly have been submitted by a motion to dismiss the petition for want of substance. Had such a motion been submitted in ordinary course, the trial justice would have been given time in which to consider it, and in case it was sustained the plaintiff might have desired and been given an opportunity to amend. The course pursued in this case resulted in the dismissal of the cause before any testimony was taken, and under circumstances equivalent to a surprise, such as made it difficult for the plaintiff to amend his pleading if such course seemed proper and desirable.

It is respectfully submitted that the procedure adopted by counsel for the respondent should be commended as being in accordance with the recognized practice of the Supreme Court of the District of Columbia and twice approved by the Court of Appeals, which court now says it "cannot commend the procedure" which leads to the directing a verdict on an opening statement.

In *Brown* v. *District of Columbia,* 29 App. D.C. 273, the opinion of the Court discloses that at the conclusion of the opening statement of plaintiff's counsel the Court directed a verdict in favor of the District of Columbia. The Court, at page 280–281, quoted from the decision of this Court in *Oscanyan* v. *Winchester Repeating Arms Company,* 103 U.S. 261. The opinion then continues, page 281:

> It was in the interest, therefore, of the speedy administration of justice, to act upon the admission when deliberately made, and avoid the delay that would be caused by the production of evidence.

Counsel has been unable to find any case decided by the Court of Appeals subsequent to the above-mentioned cases which holds that the practice of requesting the Court for a binding instruction upon the insufficiency of the plaintiff's case was not a commendable practice. The Court of Appeals neither referred to nor cited any such cases.

The decision of this Court in *Oscanyan* v. *Winchester Repeating Arms Company,* 103 U.S. 261, is clear and decisive upon the question. The opinion of the Court refers, with approval, to many decided cases. The opinion quotes with approval, page 265, the language of Mr. Justice Swayne, as follows:

> "According to the settled practice in the Courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have

> been idle to proceed further, when such must be the inevitable result. The practice is a wise one; it saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the judge and jury, and fixes, where it belongs, the responsibility which should be assumed by the Court." 10 Wall. 637 (77 U.S. XIX, 1015).

It may be assumed that petitioner's counsel was completely familiar with his case. He drew the declaration and was personally handling the case at the trial. He naturally outlined his strongest possible case to the jury in the opening statement. Petitioner's counsel did not contend that the Court did not afford every opportunity for an enlargement of the opening statement, or that the trial court's decision was hurriedly reached.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 477.—October Term, 1933.

Noah Best, Administrator of the Estate of Albert Edward Best, Deceased, Petitioner,
vs.
District of Columbia.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[March 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner's intestate, a child five years of age, while playing on a wharf belonging to the District of Columbia, fell through a hole in the wharf and was drowned. This action was for damages for the alleged negligence of the District. After a jury had been impaneled, an opening statement was made by plaintiff's counsel and thereupon the court, on motion of the defendant and without taking testimony, directed a verdict in defendant's favor upon the ground that no cause of action had been stated. The Court of Appeals affirmed the judgment (66 F. (2d) 797) and this Court granted certiorari.

The opening statement by plaintiff's counsel was as follows:

"This is a case against the District of Columbia filed by Mr. Best as administrator for the estate of his son. The facts that we will show you, briefly, are these, that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there on this morning and while in there fell through one of the holes in this wharf.

"That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole. Of course the child died, having been drowned; and the damages that the plaintiff has suffered as representing the estate of the child will be determined by you in your verdict if you are convinced by a preponderance of the evidence that we have established our case.

"That this wharf is not part of the public highway but is on private property of the District of Columbia, and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District".

There is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff's counsel where that statement establishes that the plaintiff has no right to recover. The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced. *Oscanyan* v. *Arms Company,* 103 U. S. 261, 263. The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials. *Liverpool Steamship Co.* v. *Commissioners,* 113 U. S. 33, 37. But the power is not properly exercised if the opening statement leaves doubt as to the facts or permits conflicting inferences. Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & Danville Railroad Co.* v. *Powers,* 149 U. S. 43, 45; *Texas & Pacific Railway Co.* v. *Harvey,* 228 U. S. 319, 324; *Gunning* v. *Cooley,* 281 U. S. 90, 94. The opening statement of counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence. "If a doubt exists", said the Court in the *Oscanyan* case, *supra,* "as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury". Plaintiff is entitled to the benefit of all inferences that may be drawn from his counsel's statement. To warrant the court in directing a ver-

dict for defendant upon that statement, it is not enough that the statement be lacking in definiteness but it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists. See *Illinois Power & Light Corporation* v. *Hurley*, 49 F. (2d) 681, 684; *Stuthman* v. *United States*, 67 F. (2d) 521, 523.

The controversy in this case largely turns upon a difference of view as to the inferences to be drawn from the opening statement. Thus, respondent argues that there was a failure to show that "the wharf could be seen from the public space"; that "the child was attracted by the presence of the wharf itself, or any article or thing which may have been upon the wharf"; that "there was any latent or hidden danger at the place" where the child met his death; that "there was ever a prior accident to children at or near this wharf"; that "respondent invited or permitted petitioner's intestate or other children to enter or play on its wharf". But with respect to each of these circumstances (with a single unimportant exception) the opening statement of counsel permitted an inference in petitioner's favor. Thus, his counsel stated that "this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down". From this, it was not inadmissible to infer that the wharf, without a fence and close to the street, with the side portion of the barrier down, "could be seen from the public space" and readily entered. According to the statement, the wharf was a place where boats unloaded sand which was taken out and used by the District. The inference might be drawn that the wharf had sand-piles which would be highly attractive to children. Counsel stated that there were "ten to thirteen holes" in the wharf, of varying sizes, one of them being about three feet in diameter. The existence of these holes manifestly constituted a danger and the statement does not require the conclusion that the danger would be obvious to young children playing in the sand on the wharf. The fact that the opening statement did not refer to any prior accident to children is inconsequential. On the question whether the District permitted children to enter and play on the wharf, counsel's statement gave basis for an inference that children had this permission. While counsel conceded that the wharf was "not part of the public highway" but "was on private property of the Dis-

trict" and was "not a place to which the public was admitted", he also stated that "the children went in and out at their pleasure" and that "the children used this place to play on and play in". He said that at the time of the accident there was no one "to keep the children away", as "the watchman who was stationed arrived some time after this occurrence". The statement permitted the inference that, while a watchman was customarily there, still the place was used as a playground by children, going in and out as they pleased.

In view of the fair import of the opening statement, it was error for the trial court to refuse to take testimony and to direct a verdict for respondent. None of the decisions of this Court bearing upon the liability of the District warranted that course. The case of *United Zinc Company* v. *Britt*, 258 U. S. 268, which respondent cites as controlling authority, dealt with a situation materially different. There, children were fatally injured by going into a pool of water, poisoned by acids, which had accumulated in the lower part of a dismantled chemical factory, about 100 or 120 feet distant from a traveled way. The Court stressed the facts that it was "at least doubtful whether the water could be seen from any place where the children lawfully were", that there was "no evidence that it was what led them to enter the land", and that it did not appear "that children were in the habit of going to the place". The decision did not overrule *Railroad Company* v. *Stout*, 17 Wall. 657, or *Union Pacific Railway Company* v. *McDonald*, 152 U. S. 262, although both were distinguished in the light of their particular facts. The Court said that the case of *Stout*, where the child was injured on a turntable "near a road without visible separation" and where it appeared that children had played there before to the knowledge of employees of the railroad, was perhaps "as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation". The Court added that in the very similar case of *Cooke* v. *Midland Great Western Ry. of Ireland* [1909] A. C. 229, a license was implied. Also distinguishing the case of *McDonald*, where a boy had fallen into burning coal slack "close by the side of a path on which he was running homeward from other boys who had frightened him", the Court said that "it hardly appears that he was a trespasser and the path suggests an

invitation; at all events boys habitually resorted to the place where he was. Also the defendant was under a statutory duty to fence the place sufficiently to keep out cattle". The decision permitting recovery in those circumstances was said to be very far from establishing liability "for poisoned water not bordering a road" where it was "not shown to have been the inducement that led the children to trespass" and "not shown to have been the indirect inducement because known to the children to be frequented by others".

In *New York, New Haven & Hartford R. R. Co.* v. *Fruchter*, 260 U. S. 141, where a boy, climbing to the topmost girder of a municipal bridge and thence up a latticed tower, touched a live electric wire and was injured, the Court was unable to find any sufficient evidence from which a jury could properly conclude that the railroad company either directly or by implication "invited or licensed" him to climb to a point from which he could touch the bare wire thirty feet above the street. The cases of *Erie Railroad Company* v. *Hilt*, 247 U. S. 97, and *Erie Railroad Company* v. *Duplak*, 286 U. S. 440, turned upon the application of a statute of New Jersey as construed by the state court.

The question is one of negligence,—whether particular circumstances gave rise to a duty which had not been performed. Discussing general principles, the Court observed in the *Britt* case, that infants had no greater right to go upon other peoples' land than adults and that the mere fact that they were infants imposed no duty upon landowners to expect them and to prepare for their safety. On the other hand, it was said that while "temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult". The Court said that the prineple if accepted should be very cautiously applied. We think that the present case falls within that appropriate application. Were the case merely one of an accessible wharf, it could not be said that the District would be subject to liability from the fact, without more, that a child strayed there and fell from the wharf into the water. The duty must find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated, and because of the character of the

danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection. Here, on the face of the opening statement, the location of the wharf, unfenced, close to the street with the barrier partly down, taken with the use of the wharf for unloading sand, made it a likely place for children to play. Sandpiles close at hand would constitute "a bait" they would inevitably follow. According to the statement, they did follow it and they used the wharf as a playground at their pleasure. As the authorities of the District had reason to anticipate that use, there was a duty to take reasonable precautions either to prevent it or to keep the wharf in such a proper state of repair that children would not be exposed to the danger of falling through holes.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.